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Supreme Court, U.S.
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NO. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CARINEL PRITCHARD, JR., SPECIALIST,
United States Army, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

JOHN T. PHELPS II
Colonel, Judge
Advocate General's Corps (JA)
United States Army
Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(703) 681–3580
Counsel of Record

and

MICHAEL L. WALTERS
Lieutenant Colonel, JA
United States Army

JOHN M. HEAD
Captain, JA
United States Army

LESLIE A. NEPPER
Major, JA
United States Army

T. MICHAEL GUIFFRE
Captain, JA
United States Army

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QUESTION PRESENTED

Whether the federal government may require an HIV infected individual to wear/use a condom with while having sexual intercourse with his/her spouse?

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IN THE
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CARINEL A. PRITCHARD, SPECIALIST,
United States Army, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

Petition for a Writ of Certiorari to the States Court of Appeals for the Armed Forces

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Carinel L. Pritchard, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces [hereinafter Court of Appeals] is reported at 45 M.J. 126 (1996) (Appendix A). The opinion of the United States Army Court of Criminal Appeals [hereinafter Army court] is unpublished (Appendix B).

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on September 24, 1996. The Court of Appeals granted in part and denied in part petitioner's Request for Reconsideration on February 5, 1997. This

Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(2) (Supp. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following provisions of the Uniform Code of Military Justice involved in this case provide in pertinent part:

Article 90 10 U .S.C. § 890.

"Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office;

or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

The following provision of the Manual for Courts-Martial, United States, 1984, are involved in this case:

Paragraph 14, Part IV(2)(a)(iii).

The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. . . .

Paragraph 14, Part IV(2)(a)(iv).

> The order must not conflict with the statutory or constitutional rights of the person receiving the order.

STATEMENT OF THE CASE

On September 23, 1993, Specialist Pritchard was tried at Fort Drum, New York, before a military judge sitting as a general court-martial. Pursuant to his pleas, petitioner was found guilty of willful disobedience of a lawful order, sodomy, and aggravated assault, in violation of Uniform Code of Military Justice articles 90, 125, and 128, 10 U.S.C. §§ 890, 925, and 928 (1988), respectively. The military judge sentenced Specialist Pritchard to a dishonorable discharge, three years confinement, forfeiture of all pay and allowances, and reduction to the grade of Private E1. The convening authority approved the sentence as adjudged.

On March 31, 1995, the Army Court of Criminal Appeals [hereinafter Army court] affirmed the findings and sentence in an unpublished opinion. *United States v. Pritchard,* Army 930168 (Army Ct. Crim. App. March 31, 1995) (unpub.) (Appendix B.)

On September 8, 1995, the United States Court of Appeals for the Armed Forces granted Specialist Pritchard's Petition for Grant of Review and Specified the following issue:

> WHETHER THE GOVERNMENT CAN LEGALLY ORDER AN HIV INFECTED INDIVIDUAL TO WEAR/USE A CONDOM WHEN ENGAGING IN SEXUAL INTERCOURSE WITH HIS/HER SPOUSE

United States v. Pritchard, 43 M.J. 361 (1995)(journal).

The Court of Appeals rendered its opinion on September 24, 1996, affirming the findings and sentence. *United States v.*

Pritchard, 45 M.J. 126 (1996) (Appendix A). On October 10, 1996, petitioner moved the Court of Appeals for Reconsideration. On February 12, 1997, the Court of Appeals granted the motion in part and denied the motion in part. *United States v. Pritchard,* 45 M.J. __ (1996)(journal).

STATEMENT OF FACTS

A summary of the facts found by the Army court and adopted by the Court of Appeals is as follows:

> The charges arose after the appellant tested positive for the Human Immunodeficiency Virus (HIV). Immediately upon being notified of his illness, and on two subsequent occasions, appellant was counseled by medical personnel concerning the nature of the disease and his responsibility to prevent transmission of the infection to others. Appellant signed the written counseling form used to detail this information. Appellant's commander subsequently issued a "safe sex" order. The written order incorporated the earlier medical counseling and warned that violations of either could result in punitive action.

United States v. Pritchard, 45 M.J. at 128.

Pursuant to his plea, petitioner was convicted, *inter alia,* of willful disobedience of his commander's order by not wearing a condom while engaging in sexual intercourse with his wife.

REASONS FOR GRANTING THE WRIT

a. The order requiring Specialist Pritchard to wear a condom while engaging in sexual intercourse with his wife impermissibly intrudes upon Specialist Pritchard's right to marital privacy and right to procreate.

This Court has recognized that, while not expressly mentioned in the Bill of Rights, certain "penumbral" rights exist under the Constitution of the United States. *See e.g. Loving v. Virginia,* 388 U.S. 1 (1967) (marriage); *Prince v. Massachusetts,* 321 U.S. 158 (1944)(family relations); *Skinner v. Oklahoma,* 316 U.S. 535 (1942)(procreation). The marital relationship has historically been found to lie within the zone of privacy embraced within the guarantees in the Bill of Rights. *Griswold v. Connecticut,* 381 U.S. 479 (1965). "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.,* 381 U.S. at 486. Where such fundamental rights are involved, regulations limiting or interfering with those rights may only be justified by a compelling governmental interest narrowly drawn to further that governmental interest. *Roe v. Wade,* 410 U.S. 155 (1972).

The Court in *Griswold* had to determine the constitutionally of a Connecticut statute which made it unlawful for any person to use any drug or article to prevent conception. The Executive Director of a Planned Parenthood League Center and several others were arrested for violating the statute after a married female was examined and prescribed a contraceptive. The Court opined that the case involved a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. The Court explained that governmental purposes to control or prevent activities may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. The *Griswold* Court recognized that the statute in question would have "operate[d] directly on an intimate relation of husband and wife." *Id.* at 482.

In *Loving,* Virginia had adopted a statute that sought to prevent interracial marriages. The Virginia Supreme Court of Appeals had held that the statute could withstand a Fourteenth

Amendment challenge because members of the Caucasian race and the Negro race were equally restricted. This Court disagreed. The statute was struck down, in part, because it resulted in invidious racial discrimination. However, in reaching its conclusion, the *Loving* Court reasoned that marriage is one of the basic civil rights of man, and could not be infringed upon without a narrowly tailored statute promoting a compelling government interest. The statute in *Loving* lacked a valid legislative objective. 388 U.S. at 11.

The *Roe* Court reviewed the constitutionality of a Texas statute prohibiting the procurement or the performance of an abortion, unless the abortion was needed to save the mother's life. In upholding the woman's qualified right to terminate her pregnancy, the Court applied the "strict scrutiny" test. The "strict scrutiny" test demands that laws seeking to limit "fundamental rights" be aimed at promoting a compelling governmental interest and that the law must be narrowly tailored to achieve that interest.

The standard of "strict scrutiny" must be applied in this case because the order in issue seeks to regulate the most intimate decisions between spouses. Thus, the issue is whether the order is a narrowly tailored remedy that seeks to further a compelling governmental interest.

Commanders have the authority to regulate all activities reasonably necessary to safeguard and protect the morale, discipline, and usefulness of their commands. *United States v. Martin,* 1 U.S.C.M.A. 674, 5 C.M.R. 102 (1952). However, this authority is limited. The parameters for lawful orders are as follows:

> The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, directly connected with the maintenance of good order in the service.

> The order may not, without such a valid military purpose, interfere with private rights or personal affairs. . . . The order must not not conflict with the statutory or constitutional rights of the person receiving the order.

Manual for Courts-Martial, United States, (1984), para. 14c(2)(a)(iii) and (iv).

It was not necessary or constitutionally permissible for the commander to give a soldier an order to have "safe sex" with his or her spouse. Specialist Pritchard had previously been counseled by medical personnel concerning the dangers of spreading the disease by having unprotected sex. Thus, the order was redundant with the medical counseling. Moreover, as applied to a married soldier and that soldier's private marital relationship, an order to have "safe sex" lacks a valid military purpose.

Orders that are excessively broad in scope or which needlessly abridge personal rights are subject to close judicial scrutiny and may be found to be invalid and unenforceable. *United States v. Womack,* 27 M.J. 630, 633 (A.F.C.M.R. 1988) *aff'd,* 29 M.J. 88 (C.M.A. 1989); *United States v. Green,* 22 M.J. 713, 716 (A.C.M.R. 1986)(regulation prohibiting soldiers from having alcohol in their system or on their breath held to be arbitrary, unreasonable, and standardless, and thus invalid and unenforceable); *see also United States v. Aycock,* 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964)(order prohibiting accused from contacting principal witnesses concerning criminal charges against him held invalid as unlawfully hampering defense preparation for pending judicial proceedings); *United States v. Wysong,* 9 U.S.C.M.A. 244, 26 C.M.R. 29 (1958)(order prohibiting accused from speaking with soldiers concerning an on-going investigation directed at accused's family held invalid on grounds that it was vague,

indefinite, and an impermissible restriction on accused's freedom of speech); *United States v. Nation,* 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958)(regulation requiring six-month waiting period before consideration of application to marry alien held to be overboard, unreasonable, and unenforceable).

Generally, a "safe sex" order given to a soldier who has tested HIV positive has been held to be a valid exercise of authority by commanders for the purpose of preserving the health and readiness of servicemembers. *United States v. Womack,* 29 M.J. 88, 89 (C.M.A. 1989); *United States v. Negron,* 28 M.J. 775, 778 (A.C.M.R.), *aff'd,* 29 M.J. 324 (C.M.A. 1989). The Court of Appeals for the Armed Forces held that such orders may also permissibly restrict a servicemember's sexual contacts with civilians as the military has a legitimate interest in preventing the spread of an infectious disease. *United States v. Johnson,* 30 M.J. 53 (C.M.A. 1990); *United States v. Stewart,* 29 M.J. 92 (C.M.A. 1989). However, to the extent that such an order purports to relate to Specialist Pritchard's relations with his wife, the order in this case exceeds the authority of the commander because it invades the Specialist Pritchard's constitutionally protected zone of privacy in his marital relationship.

Clearly, the health interest is to avoid the proliferation of HIV. Even if preventing the spread of HIV is determined to be a compelling governmental interest, the order to use a condom with the servicemember's spouse is still flawed because it is not narrowly tailored. The order itself adds little or nothing to the furtherance of the government's public health objectives. If one considers the constitutional question in terms of the reasonableness of the order rather than the nature of the disobedience, one has to evaluate the vital health interests sought to be protected. *United States v. Womack,* 27 M.J. at 632. Medical personnel had already counseled Specialist Pritchard about the need to use a condom while having sex

and the need to inform his sexual partners that he was HIV positive. (Prosecution Exhibit 1)

In *Negron,* the Army court recognized that the paramount consideration (public health interest) for "safe sex" order was to "establish a reasonable, common sense requirement for notice" to persons potentially involved with the HIV positive soldier on an intimate basis. 28 M.J. at 778 (quoting *United States v. Womack,* 27 M.J. at 633).

In cases where the servicemember is single, the order may be needed because potential sex partners are not readily identifiable to the medical personnel. In those cases, the soldier must arguably bear the burden of notification because the persons potentially at risk are unknown to the government. Those cases are also distinguishable from this case because not all sexual relations outside of the marriage are viewed as being the "penumbral rights" protected by the Constitution. *United States v. Womack,* 27 M.J. at 632. *See also, Bowers v. Hardwick,* 478 U.S. 186 (1986)(engaging in homosexual sodomy is not protected by the constitutional zone of privacy).

However, in the cases where the HIV positive servicemember is married, there is a reasonable certainty that the servicemember may engage in marital sexual relations with his or her spouse. In addition, the identity of the spouse is readily available to the government as the spouse is listed as a dependent of the servicemember.

The order to use a condom directly impacts upon the intimate relationship of a husband and wife. Any argument that the government already regulates marriages through laws designed to protect one spouse from violence perpetrated by the other misses the issue. An HIV positive solder engaging in unprotected and uninformed sex is already addressed by the statute prohibiting aggravated assault. The order to have "safe

sex" adds little or nothing to the attainment of the government's objective.

Doe v. Coughlin, 518 N.E.2d 536 (N.Y. 1987), *cert. denied,* 488 U.S. 879 (1988), is clearly distinguishable from this case. In *Doe,* an HIV positive individual was a prison inmate who had been denied participation in a special prison program that allowed inmates to have conjugal visits with their spouses. The decision in *Doe* held that the inmate and his wife had no legitimate expectation of conjugal visits and the right to such visits was not protected by the Constitution. In this case, the Petitioner was not in jail and was cohabitating with his wife.

Once the government starts to directly regulate how married individuals relate to each other within the confines of that relationship, there is a significant danger that constitutionally protected freedoms will be infringed upon. *Griswold.* The order here fails because it invades private marital decisions. Government mandated use of a condom could possibly have numerous long lasting, adverse effects on Specialist Pritchard's marital relationship. For example, the impact of the order could supersede decisions by the couple as to whether they want to attempt to procreate, notwithstanding the medical condition of Specialist Pritchard. Even if the couple did not want to have children now, the order forecloses the option for the couple to change their mind and attempt to do so at any time in the future. The order is the functional equivalent of the Oklahoma sterilization statute declared unconstitutional in *Skinner.* Petitioner is de facto sterilized by the government as he is not allowed to engage in unprotected sex with his wife for the purposes of procreation.

Prompt notice to the spouse through medical channels satisfies the governmental health care interests. Such disclosure is best handled by medical personnel. Medical personnel are best equipped to answer the likely questions

concerning the transmission of the disease, the need for testing, and other health implications associated with having an HIV positive spouse. Once the spouse is informed, and the corresponding support and medical attention is provided, the government has performed the acts reasonably necessary and likely to prevent the spread of the disease.

Specialist Pritchard's fundamental rights are not rendered null and void solely because of his status as a member of the Armed Forces. Nor are his constitutional rights eviscerated because of his medical condition. The order in this case is an unnecessary and impermissible intrusion into the most intimate and private affairs a married couple could possibly have: how to conduct their sexual relationship. In *Griswold,* the state interest in promoting conception ran afoul of the constitutionally protected zone of privacy created by the marital relationship. The order here suffers an analogous constitutional infirmity. In essence, the case *sub judice* is the mirror image of *Griswold,* except here the government is requiring a married couple to use contraception.

The order here, like the statutes in *Loving, Griswold,* and *Roe,* constitutes a governmental intrusion into the private decisions implicit in the marital relationship. Providing advice to the spouse of the HIV infected soldier through medical channels satisfies the government's health concerns without impermissibly interfering with the fundamental rights of married couples. The rational connection between the commander's order and the recognized health care concerns is far too indirect and attenuated for the government to prevail in this case.[1]

---

[1]Army Regulation 600–110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus, para. 6–8 (11 March 1988)(Change 1, 22 April 1994), requires notice to spouses by a physician. This regulation constitutes a rationally related means of promoting the government's health care concerns without broadly interfering with marital relations.

b. The Court of Appeals erroneously disposed of the specified issue by holding that the accused waived consideration by his plea of guilty and applied a plain error analysis.

An order which is not "palpably illegal" on its face is clothed with a presumption of legality. *United States v. Trani*, 3 C.M.R. 27, 31 (C.M.A. 1952) (*citing* Winthrop, *Military Law and Precedents* (2d ed. 1920)). However, when a strong showing is made indicating the order is unlawful, the presumption vanishes, and the issue of lawfulness must be determined as an interlocutory question by the military judge. *Id.; United States v. Young,* 6 M.J. 975 (A.C.M.R. 1979). In determining the legality of an order, this Court has held that, "whether an act comports with law, that is, whether it is legal or illegal, is a question of law, not an issue of fact. . . ." *United States v. Carson,* 15 U.S.C.M.A. 407, 408, 35 C.M.R. 379, 380 (1965).

The military judge in the case *sub judice,* was faced with a "palpably illegal" order as it applied to the spouse, because it was unconstitutional, as discussed above. The military judge recognized the constitutional implications of the order. (R. at 85). As it is a "palpably illegal" order, the military judge had a *sua sponte* duty to dismiss the offense.

When the Court of Appeals initially dealt with the specified issue, it applied the waived by guilty plea doctrine and held "[t]he final, specified, issue concerns the propriety of appellant's conviction for having unprotected *sodomy* with his wife in violation of this commander's safe-sex order (*Specification 2 of Charge I*)." *United States v. Pritchard,* slip op. at 12 (September 24, 1996)(emphasis added). After granting, in part, petitioner's motion for reconsideration, the court corrected the language regarding sodomy to properly refer to unprotected intercourse, the court below applied a waiver by guilty plea/plain error standard and found no plain error. *Pritchard,* 45 M.J. at 131 (*citing United States v. Olano,*

507 U.S. 725, 732–735 (1993)). This was error as the issue is not waived by a plea of guilty, but addresses the ability of the government to bring petitioner to trial at all.

An attack on the constitutionality of the order the violation of which petitioner is convicted, is not waived by a guilty plea. *Blackledge v. Perry,* 417 U.S. 21 (1974); *Menna v. New York,* 423 U.S. 61(1975)(per curiam). Emphasizing *Menna's* holding that "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute," this Court limited the doctrine to cases in which the judge could determine at the time of accepting the plea, from the face of the charge or from the record, that the government lacked the power to bring the charge. *United States v. Broce,* 488 U.S. 563, 573 (1989) (*quoting* and *emphasizing Menna,* 423 U.S. at 63 n. 2, 96 S.Ct. at 242 n. 2). Under this trilogy of cases, the question of whether the order and, therefore, its enforcing statute, is lawful, is jurisdictional and cannot be waived.

The necessity to rectify the Court of Appeals' failure to protect the constitutional rights of petitioner because of its misapplication of law, warrants the exercise of this Court's appellate jurisdiction.

CONCLUSION

The Court of Appeals applied the wrong standard of review to this issue of basic constitutional rights. The order by appellant's commander is palpably illegal and an unnecessary and impermissible intrusion into the marital relationship. Therefore, using Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890, to enforce it, renders the enforcing statute unconstitutional as applied.

Finally, the issue is likely to reappear. Current regulatory practice requires the issuance of safe sex orders to HIV

infected soldiers. *See* Army Regulation 600–110, *supra* note 1. In the interest of justice this Court must address the issue and prevent future injustice.

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

JOHN T. PHELPS II
Colonel, Judge Advocate General's Corps (JA)
United States Army
Defense Appellate Division
U.S.Army Legal Services Agency
5611 Columbia Pike
Falls Church, VA 22041
(703) 681–3590
Counsel of Record

and

MICHAEL L. WALTERS
Lieutenant Colonel, JA
United States Army

LESLIE A. NEPPER
Major, JA
United States Army

JOHN M. HEAD
Captain, JA
United States Army

T. MICHAEL GUIFFRE
Captain, JA
United States Army

May 1997

APPENDIX A

UNITED STATES, Appellee

v.

Carinel PRITCHARD, Jr., Specialist
U. S. Army, Appellant

No. 95–0945

Crim. App. No. 9301648

United States Court of Appeals for the Armed Forces

Argued March 27, 1996
Decided Sep. 24, 1996

Counsel

For Appellant: *Captain Walter R. Dukes* (argued); *Colonel Stephen D. Smith, Lieutenant Colonel John T. Rucker, Major J. Frank Burnette* (on brief).

For Appellee: *Captain Kenneth D. Albert* (argued); *Colonel John M. Smith, Lieutenant Colonel Eva M. Novak, Major Anthony P. Nicastro, Captain Eugene E. Baime* (on brief).

Military Judge: Robert D. Newberry

Opinion of the Court

SULLIVAN, Judge:

On September 23, 1993, appellant was tried by a military judge sitting alone as a general court-martial at Fort Drum, New York. Pursuant to his pleas, he was found guilty of willfully disobeying a lawful order (3 specifications), sodomy, and aggravated assault (2 specifications), in violation of Articles 92, 125, and 128, Uniform Code of Military Justice, 10 USC §§ 892, 925, and 928, respectively. The military judge sentenced him to a dishonorable discharge, confinement for 3

years, total forfeitures, and reduction to the lowest enlisted pay grade. On December 22, 1993, the convening authority approved the sentence. On March 31, 1995, the Court of Criminal Appeals affirmed in an unpublished opinion.

On September 8, 1995, this Court granted review on the following question of law:[1]

> WHETHER, ASSUMING, ARGUENDO, THAT CAPTAIN HEAP'S ORDER DID INCLUDE THE PROHIBITION AGAINST ENGAGING IN SODOMY WITHOUT A CONDOM,THIS ORDER WAS NOT A LAWFUL MILITARY ORDER.

We also specified the following question for review:

---

[1]We heard oral argument in this case at the United States Military Academy at West Point, New York, on March 27, 1996, at the invitation of the Department of Law, United States Military Academy, and without objection from the parties involved. *See* Foundation of the Federal Bar Association, *Equal Justice Under Law: The Supreme Court in American Life 15–18* (1965); *see also* O'Brien, *Storm Center: The Supreme Court in American Politics* 78, 135–40 (2d ed. 1990). This procedure is similar to the well-established practice of the United States Court of Appeals for the Eighth Circuit which holds hearings at various law schools within its circuit.

The United States Court of Appeals for the Armed Forces conducts a hearing such as this outside its permanent courthouse in Washington, D.C., as part of its "Project Outreach," a public awareness project which demonstrates not only the operation of a Federal appellate court but also the quality and effectiveness of the criminal justice system of our Armed Services, the Uniform Code of Military Justice (Arts. 1–146, 10 USC §§ 801–946, respectively). It is hoped that the thousands of students, service persons, military and civilian attorneys, and members of the American public who witness these hearings will realize that America is a democracy that can maintain an Armed Force instilled with the appropriate discipline to make it a world power and yet afford the members of that Armed Force a fair and impartial justice system which does provide the full protection of the Constitution of the United States and Federal law to its members.

WHETHER THE GOVERNNENT CAN LEGALLY ORDER AN HIV-INFECTED INDIVIDUAL TO WEAR/USE A CONDOM WHEN ENGAGING IN SEXUAL INTERCOURSE WITH HIS/HER SPOUSE.

We hold that the record of trial in this guilty-plea case clearly establishes that Captain Heap gave a lawful order to appellant to refrain from engaging in any type of sexual intercourse including sodomy without a condom. *See generally Parker v. Levy,* 417 U.S. 733, 761 (1974).

The Court of Criminal Appeals found the following facts concerning appellant's admitted offenses:

> The charges arose after the appellant tested positive for the Human Immunodeficiency Virus (HIV). Immediately upon being notified of his illness, and on two subsequent occasions, appellant was counseled by medical personnel concerning the nature of the disease and his responsibility to prevent transmission of the infection to others. Appellant signed the written counseling form used to detail this information. Appellant's commander subsequently issued a "safe sex" order. The written order incorporated the earlier medical counseling and warned that violations of either could result in punitive action.
>
> Appellant pleaded guilty, inter alia, to willful disobedience of his commander's order by not wearing a condom while engaging in sodomy and for failure to advise his sodomy partner of his HIV infection. The appellant now attacks the providence of his plea because there is no factual basis that the order required him to advise prospective "sodomy" partners of his HIV status and that it did not require him to wear a condom during the act of sodomy. We disagree.

> The military judge conducted a thorough, searching inquiry into the providence of the appellant's pleas of guilty. He identified and fully explored the issue raised by appellant concerning the wording of the order. The appellant insisted several times during the inquiry that he understood the "safe sex" order to include the requirement to advise sodomy partners of his infection and to wear a condom during sodomy. The military judge correctly accepted the appellant's understanding of the order. We conclude that the military judge properly accepted appellant's plea of guilty. Rule for Courts-Martial 910(e); *United States v. Davenport,* 9 M.J. 364 (C.M.A 1980); *United States v. Care,* 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

Unpub. op. at 1–2.

Prosecution Exhibit 1 (Page 6 of 7), a copy of the order given to appellant, states in part:

> 8. Date and Circumstances
>
> The purpose of this command counseling is to inform you of the DA [Department of the Army] and command policy regarding your responsibilities as a result of testing positive for the Human Immunodeficiency Virus (HIV) antibody. *This counseling supplements and complements the Preventive Medicine counseling you received.*
>
> 9. Date and Summary of Counseling
>
> I have been advised that you were counseled by Preventive Medicine personnel concerning your diagnosis of HIV positivity, the risk this condition poses to your health, as well as the risk you pose to others. *You were advised by medical personnel as to necessary precautions you should take to minimize*

the health risk to others as a result of your condition. While I have great concern for your situation and need, in my capacity as commander, I must also be concerned with, and ensure the health, welfare, and morale of the other soldiers in my command. Therefore, I am imposing the following restrictions:

a. *You will verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner.*

b. You will not donate blood, sperm, tissues, or other organs since this virus can be transmitted via blood and body fluids.

c. You will notify all health care workers of your diagnosed condition if you seek medical or dental treatment, or accident requires treatment. If you do not understand any element of this order, you will address all questions to me. *Failure on your part to adhere to your Preventive Medicine counseling or the counseling I have just given you will subject you to administrative separation and/or punishment under the U.C.M.J., as I see fit.*

(Emphasis added.)

Prosecution Exhibit 1 (page 4 of 7) also contains a copy of the patient counseling advice given to appellant and referred to above, which states.

E. Although I may have no symptoms presently, I may still transmit the infection to others through sexual intercourse, sharing of needles, donated blood or blood products, and *possibly through exposure of others to*

> *saliva through oral-genital contact or intimate kissing.* I have been informed that transmission of HIV infection through sexual intercourse can be avoided only through abstinence. If I cannot abstain, then I must engage only in protected sexual relations (i.e. using a condom). Males must always use a condom and females must insist that their partners use condoms. While the ability of condoms to prevent transmission of infection is unproved they may reduce the chance of transmission and I must always use them or insist on their use during all sexual encounters.

(Emphasis added.)

As a preliminary matter, we note that appellant initially suggests that the order he allegedly violated did not "constitute[] an order to advise or wear a condom while engaging in oral sodomy." He contends that Captain Heap's order only applied to acts of "sexual intercourse" that he might engage in. He asserts that "[s]odomy is clearly a wholly different course of conduct and cannot logically be viewed as being encompassed within the meaning of 'sexual intercourse.'" Final Brief at 3 n.1. Consequently, he implies that his orders' conviction based on his act of oral sodomy with H.B. (specification 1, Charge I) cannot be lawfully sustained. We disagree.

As a starting point, we note that no question exists that appellant admitted that his commander's order included an order to wear a condom if he engaged in oral sodomy. Appellant acknowledged that he understood his commander's order to include wearing a condom during "all sexual acts." He further admitted that he construed his commander's order in light of his prior medical counseling that oral sex could

transit HIV. Finally, a copy of the now challenged order and an earlier Preventive Medicine Advice form admitted as part of prosecution exhibit 1 clearly indicate that "any sexual intercourse" for the purpose of this order includes oral sodomy.

Nevertheless, we note that sexual intercourse is particularly alleged in the specifications at issue[2] and the act of sodomy was considered by the military judge as the basis of one of the orders' violations. An argument based on a variance between the offense alleged and the offense proved might be made in this case. *See generally United States v. Harris,* 8 M.J. 52 (C.M.A. 1979). A long line of decisions by this Court, however, rejects finding an improvident plea where the offense pleaded to is "closely related" to the offense charged. *See United States v. Epps,* 25 M.J. 319, 323 (C.M.A. 1987) (larceny/receiving stolen property); *United States v. Cooper-Tyson,* 37 M.J. 481 (C.M.A. 1993) (marijuana/

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[2]SPECIFICATION 1: In that SPC Carinel Pritchard Jr., U.S. Army, having received a lawful command from CPT Michael Heap, his superior commissioned officer, then known by the said SPC Pritchard to be his superior commissioned officer, to verbally advise all prospective sexual partners [H.B.] of his diagnosed condition prior to engaging in any sexual intercourse and to use condoms in sexual intercourse with any partner, or words to that effect, did, at Loweville, NY, about 31 January 1993, willfully disobey the same.

SPECIFICATION 2: In that SPC Carinel Pritchard Jr., U.S. Army, having received a lawful command from CPT Michael Heap, his superior commissioned officer, then known by the said SPC Pritchard to be his superior commissioned officer, to verbally advise all prospective sexual partners [D.P.] of his diagnosed condition prior to engaging in any sexual intercourse and to use condoms in sexual intercourse with any partner, or words to the effect, did, at Watertown NY, between on or about 1 March 1993 and on or about 31 May 1993, willfully disobey the same.

methamphetamene). In this sense we conclude that failure to wear a condom or advise a sexual partner about a communicable disease prior to sexual intercourse is "closely related" to failure to do the same prior to another form of sexual connection.

In addition we note that this technical variance problem arises for the first time on appeal. In *United States v. Sell,* 3 U.S.C.M.A. 202, 206 11 C.M.R. 202, 206 (1953), this Court established a different rule for assessing the legal sufficiency of specifications so challenged. This Court said:

> Because there still remains some uncertainty about the tests to be applied in ascertaining the sufficiency of specifications, we believe it well to reiterate what we have previously announced. The rigor of old common-law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Fruthermore, when the pleadings have not been attacked prior to findings and sentence, it is enough to withstand a broadside charge that they do not state an offense, *if the necessary facts appear in any form or by fair construction can be found within the terms of the specification.* For a certainty, appellate tribunals should not permit a pleading to

> be challenged for the first time on appeal merely because it is loosely drawn.

(Emphasis added.)

Admittedly, the words sodomy or oral sodomy are not expressly included in the specification at issue before us. However, the phrase "sexual intercourse" can be reasonably understood to include sodomy and oral sodomy. *See United States v. Scoby,* 5 M.J. 160, 166 (C.M.A. 1978); s*ee also Commonwealth v. Bucaulis,* 373 N.E. 2d 221, 226 (Mass. App. 1978). Moreover, such a construction is most appropriate where other words or phrases in the specifications suggest a broad meaning be given the words of the safe-sex order, *i.e.,* "all prospective sexual partners"; "any sexual intercourse"; "with any partner." Finally, the general qualifier "or words to that effect" suggests that the safe-sex order in question is not to be considered as being alleged verbatim in the specification. In this light, we reject any suggestion of variance in this case as unwarranted.

Turning now to the first granted issue, appellant argues that violations of his commander's order to wear a condom during sexual intercourse could not be lawfully prosecuted under Article 90. He contends that his order constituted no more than an exhortation not to commit a crime (aggravated assault under Article 128), which is not within the ambit of Article 90. *See* para. 14c(2)(a)(iii), Part IV, Manual for Courts-Martial, United States, 1984 (an order given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit it not punishable under this Article). He also argues, apparently on public policy grounds, that his commander's order was unlawful because it purports to regulate the commission of an act that is already a crime.

Appellant pleaded guilty to these orders' offenses and waived any potential defenses to them based on paragraph

14c(2)(a)(iii). *See* RCM 910(j), Manual, *supra.* Moreover, we agree with the Government that the orders admittedly violated by appellant were specific mandates to protect military and public health, which went far beyond exhorting him not to commit aggravated assault. *See United States v. Traxler,* 39 M.J. 471, 479 (C.M.A. 1994). Finally, as for appellant's public policy argument, we find it specious on its face and unsupported as a matter of law. *See generally United States v. Johnson,* 30 M.J. 53, 56 (C.M.A. 1990): "[T]he military services and society at large have a compelling interest to ensure that those who defend the nation remain healthy and capable of performing their duty."

The final, specified issue concerns the propriety of appellant's conviction for unprotected sodomy with his wife in violation of his commander's safe-sex order (specification 2 of Charge I). This question has obvious constitutional implications, but they need not be addressed in this case. *See generally Parker v. Levy,* 417 U.S. at 758–59; *Griswold v. Connecticut,* 381 U.S. 479 (1965); *see* D. Schlueter, *Military Criminal Justice: Practice and Procedure* § 2–9D (3d ed. 1992). Appellant conceded this issue at trial.

The military judge expressly stated his concern whether "a commander can give an order to an accused to wear condoms with his wife, because that might interfere with the constitutionally protected right to procreate." He also noted that "both sides" agreed it "would be a lawful order because of potential adverse-extremely adverse effects upon the spouse, perhaps even the military, tangentially through medical care that might be provided, perhaps. . . ." Finally, appellant, on questioning by the military judge, readily agreed that, although "a commander normally can't interfere with marital relations," the military's interest in preventing egregious injury to his spouse and transmission of the disease to the civilian community justified this order, so it was valid.

To the extent that balancing competing interests is involved to resolve this delicate constitutional question (*see Parker v. Levy, supra* at 755), we find no plain error exists in this case. *See United States v. Olano,* 507 U.S. 725, 732–35 (1993).

The decision of the United States Army Court of Criminal Appeals is affirmed.

Chief Judge COX, Judges CRAWFORD and GIERKE, and Senior Judge EVERETT concur.

UNITED STATES, Appellee

v.

Carinel PRITCHARD, Jr., (076–58–2134), Appellant

USCA Dkt. No. 95–0945/AR

Crim. App. No. 9301648

MANDATE

TO THE JUDGE ADVOCATE GENERAL, UNITED STATES ARMY:

In the above-styled cause heard by the Court on March 27, 1996, it is, by the Court, this 5th day of February 1997,

ORDERED:

That the decision of the United States Army Court of Criminal Appeals is affirmed. __ MJ __ (No. 95–0945, Sept. 24, 1996).

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

SEAL

APPENDIX B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

CAIRNS, GONZALES, and RUSSELL
Appellate Military Judges

UNITED STATES, Appellee

v.

Specialist CARINEL PRITCHARD, JR.,
076–58–2134,

United States Army, Appellant

ARMY 9301648

10th Mountain Division (Light Infantry) and
Fort Drum

R. D. Newberry, Military Judge

For Appellant: Colonel Stephen D. Smith, JAGC, Major Michael A. Egan, JAGC (on brief).

For Appellee: Captain Anthony P. Nicastro, JAGC, Captain Eugene E. Baime, JAGC (on brief).

31 March 1995

MEMORANDUM OPTNION

CAIRNS, Senior Judge:

In accordance with his pleas, the appellant was found guilty by a military judge setting as a general court-martial of three specifications of willfully disobeying an order of a superior commissioned officer, two specifications of aggravated assault, and one specification of sodomy in

violation of Articles 90, 128, and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 928, and 925 (1988) [hereinafter UCMJ]. He was sentenced to a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to Private E1. Consistent with a pretrial agreement, the convening authority approved the sentence.

The charges arose after the appellant tested positive for the Human Immunodeficiency Virus (HIV). Immediately upon being notified of his illness, and on two subsequent occasions, appellant was counseled by medical personnel concerning the nature of the disease and his responsibility to prevent transmission of the infection to others. Appellant signed the written counseling form used to detail this information. Appellant's commander subsequently issued a "safe sex" order. The written order incorporated the earlier medical counseling and warned that violations of either could result in punitive action.

Appellant pleaded guilty, inter alia, to willful disobedience of his commander's order by not wearing a condom while engaging in sodomy and for failure to advise his sodomy partner of his HIV infection. The appellant now attacks the providence of his plea because there is no factual basis that the order required him to advise prospective "sodomy" partners of his HIV status and that it did not require him to wear a condom during the act of sodomy. We disagree.

The military judge conducted a thorough, searching inquiry into the providence of the appellant's pleas of guilty. He identified and fully explored the issue raised by appellant concerning the wording of the order.* The appellant insisted

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*We agree that the order could have been clearer. We recommend the order upheld in *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) as an example of a clear "safe sex" order.

several times during the inquiry that he understood the "safe sex" order to include the requirement to advise sodomy partners of his infection and to wear a condom during sodomy. The military judge correctly accepted the appellant's understanding of the order. We conclude that the military judge properly accepted appellant's plea of guilty. Rule for Courts-Martial 910(e); *United States v. Davenport,* 9 M.J. 364 (C.M.A. 1980); *United States v. Care,* 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

We have carefully considered the issues personally raised by appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), and find them to be without merit. We specifically find that the sentence was entirely appropriate and does not warrant relief under Article 66, UCMJ. Appellant's *Grostefon* assertion regarding sentence relief raises an issue of clemency and not sentence appropriateness. *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988). His remaining assertions of error are meritless.

The findings of guilty and the sentence are affirmed.

Judge GONZALES and Judge RUSSELL concur.

FOR THE COURT:

WILLIAM S. FULTON , JR.
Clerk of Court